PUBLIC PROSECUTOR

v.

KAMDE RASPANI

HIGH COURT MALAYA, JOHOR BAHRU
ZAKARIA YATIM J
[CRIMINAL TRIAL NO. 17 OF 1984]
10 APRIL 1988

CRIMINAL LAW AND PROCEDURE: *Dangerous Drugs - Amended charge of cultivating cannabis - Caution statements - Whether made voluntary and without threat or inducement - Violation of r. 20 of the Lock up Rules 1953 - Whether interrogation unfair and oppressive.*

The accused was tried for an amended charge of cultivating cannabis on 24 September 1980 at Kampung Parit Satu, Sanglang, Ayer Baloi, Pontian, Johor contrary to s. 6B(1) (a) of the Dangerous Drugs Act 1952. The prosecution sought to tender 2 caution statements purportedly made by the accused. The defendant objected to the admissibility of the statements and a trial within a trial was held.

Evidence was given that the statements were recorded in Bahasa Malaysia and under cross examination the prosecution's witness admitted that the words were the words of a police officer and not the words of the accused. It was also known that although the statements were read back to the accused they were not interpreted to him.

Under further cross examination it was shown that the accused was interrogated for 17½ hours between 11 January and 12 January 1982 and was carried out after 6.30 pm in breach of r. 20 of the Lock up Rules 1953. The accused gave evidence that he was assaulted by 2 policemen and that he fabricated the statement in order to avoid further beatings.

Held:

[1] That the cautioned statements were inadmissible on the grounds that the words in the statements were not the accused's own words.

[2] That the manner in which the interrogation was carried out and the length of the interrogation which was in breach of the Lock Up Rules were unfair and must be regarded as oppressive.

[3] The accused's evidence that he was assaulted cannot be rejected as his evidence is consistent with evidence of one of the Prosecution's witness.

[4] For the above reasons it was held that the 2 statements were inadmissible because the Court was satisfied that they were not made voluntarily.

[5] There was further insufficient circumstantial evidence to link the accused to the offence.

[Accused acquitted and discharged.]

Cases referred to:
Dato Mokhtar Bin Hashim v. Public Prosecutor [1983] CLJ (Rep) 101
Public Prosecutor v. Akin Khan Bin Abdul Khanan [1987] CLJ (Rep) 859

Legislation referred to:
Criminal Procedure Code, s. 117
Dangerous Drugs Act 1952, ss. 6B(1)(a), (3), 39B(1)(a)
Lockup Rules 1953, r. 20

For the public prosecutor - Nor Afizah Hanum Bt Mokhtar, DPP
For the accused - R.K. Menon; M/s. R.K. Menon & Co.

JUDGMENT

Zakaria Yatim J:

The accused was originally charged with trafficking in dangerous drug, namely, 3,932 grammes of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952. At the commencement of the trial the learned Deputy Public Prosecutor tendered an amended charge, which reads as follows:

> That you on 24 September 1980, did cultivate, on behalf of another person still at large, cannabis, at Kampung Parit Satu, Sanglang, Ayer Baloi, in the District of Pontian, in the State of Johor, and thereby you have committed an offence under s. 6B(1)(a) and punishable under s. 6B(3) of the Dangerous Drugs Act 1952.

The prosecution called thirteen witnesses to prove their case. Briefly, the case for the prosecution is that on 24 September 1980, a police party led by Inspector Buang bin Mol (PW1) went to a place at Kampung Parit Satu, Sanglang, Ayer Baloi and there laid an ambush. After waiting there for sometime, the police party saw a male person, who was identified in Court as Sumari bin Saribu (PW11) entering a 'belukar' where dried leaves were kept. When PW1 entered the belukar he was opening a gunny sack. The police party arrested him and took the dried leaves, which they believed to be ganja. PW11 then led the police party through the belukar to an open area about 100 feet from where he was arrested. The police found that the open area was grown with ganja plants. The police pulled out all the ganja plants and brought them together with the dried ganja leaves and PW11 to Pontian Police Station. PW11 was then interrogated by the police. In his evidence in Court, PW11 alleged that he was assaulted by the police and was asked to "press" the accused as the person responsible for the cultivation of the ganja plants. The other witnesses for the prosecution were formal witnesses to corroborate the evidence of the prosecution on the seizure of the dried ganja leaves and the ganja plants as well as the evidence on the arrest of PW11.

In the course of the prosecution case, the prosecution sought to tender two cautioned statements, purportedly made by the accused, as exhibits in support of the prosecution case. Mr. Menon, Counsel for the accused objected to the statements being used as evidence at the trial. In view of the objection, the Court ordered that a trial within a trial be held to determine whether the two statements were admissible as evidence.

For the statements to be admissible, the prosecution must prove beyond reasonable doubt that the statements were made voluntarily without any inducement, threat or promise. See *Dato Mokhtar bin Hashim v. Public Prosecutor* [1983] CLJ (Rep) 101 @ 109. It is the duty of the prosecution to prove affirmatively to the satisfaction of the Court that the statements were made voluntarily and not obtained by any improper means. *Public Prosecutor v. Singaran* (Kedah Criminal Trial No. 11 of 1974) (unreported).

The prosecution called Inspector Chan Yoke Meng, the officer who recorded the two cautioned statements of the accused; Inspector Abdul Mutalib, the officer who acted as interpreter when the statements were recorded; Inspector Kamaruddin, the investigation officer; and the Magistrate who made the remand orders under s. 117 of the Criminal Procedure Code. For the defence, the accused himself testified on oath. The other witnesses for the defence were Sumari bin Saribu, who gave evidence for the prosecution before the trial within a trial and Mohd. Noor bin Jadi, a relative of the accused. The defence made a serious allegation that

the accused was assaulted by the police and was forced to make the statements. The prosecution recalled Inspector Chan, and Inspector Kamaruddin as well as two other witnesses to rebut the defence allegation.

Before going into the question of whether the statements were voluntary or not, it is relevant to consider whether a proper caution had been given to the accused and whether the recording of the statements was done in a proper manner. Inspector Chan, in his evidence admitted that in the caution he administered to the accused there was no comma after the word "tidak". I agree with the learned Judge in his ruling in *Public Prosecutor v. Seman B. Misbah* (Criminal Trial 4 of 1983) that without the comma the caution can mean two ways. It can mean that what the accused said can be used in evidence or that it cannot be used in evidence against him. Therefore, the caution itself is very ambiguous. This is especially so when the caution had to be translated to the accused into simple Malay.

Apart from the administration of the caution itself, it is doubtful whether the statements were recorded in a proper manner. According to Inspector Chan, he had difficulty in understanding the accused because of the accused's Javanese accent. So he called Inspector Mutalib to act as interpreter. Inspector Chan told the Court that he recorded the statements in Bahasa Malaysia. Under cross-examination, Inspector Chan admitted that what he typed in the statements were the words of Inspector Mutalib and not the words of the accused. He added that the statements were read back to the accused, but they were not interpreted back to the accused. In my opinion, the words in the cautioned statements were not the words of the accused. In the circumstances, it cannot be said that the statements were the accused's statements. Furthermore, the statements were not interpreted back to him. In *Public Prosecutor v. Akin Khan bin Abdul Khanan* [1987] CLJ (Rep) 859 @ 861, Abdul Malek J decided that the cautioned statement was inadmissible on the grounds, *inter alia*, that "TPW1's admission that the words in the cautioned statement were not the accused's exact words, but words standardised by TPW1 into Malay as they went along". The situation in that case is similar to that of the present case, and I agree with Abdul Malek J's decision.

I shall next consider the question of voluntariness. According to Inspector Kamaruddin, the accused was arrested on 10 January 1982. From the date until 13 January 1982, the accused was taken out of the lock-up for interrogations.

At 3.00 p.m. on 13 January 1982 Inspector Kamaruddin already requested Inspector Chan to record the cautioned statement. During that short period, the accused was subject to long hours of interrogation. Under cross-examination, Inspector Kamaruddin admitted that on 11 January, and 12 January, the accused was interrogated for 17½ hours until the early hours of the morning. The interrogations were carried out after 6.30 pm in violation of r. 20 of the Lockup Rules 1953 which states:

> Prisoners shall be locked up for the night by 6.30 p.m. and shall rise and be dressed by 6.30 a.m.

The way the accused was interrogated is indeed unfair and the Court must regard it as oppressive.

Apart from the long hours of interrogation, there is the allegation of the accused that he was assaulted on two occasions during the interrogations. In his evidence he said two policemen in civilian clothes took him out of the lock up and brought him to a room. He said that both the policemen asked him to tell them about the ganja plants found in 1980. He said that he told them he did not know about it. According to the accused, the policemen then punched him twice in the chest. One of them then kicked him on the right hip until he was

thrown off to the floor. Later when he got up, one policeman punched him in front and the other in the back. He told the Court that the two policemen punched him continuously until he became unconscious.

The next day at 7.00 p.m. two other policemen took him out of the lock up and brought him to a room. There, he said, he was whipped with a rubber whip. He said he could not stand the pain and was compelled to fabricate his own statement. He further said that if he had not been beaten by the police, he would not have given the statement to the police. According to him, he fabricated the statement in order to save his skin. He was threatened by the two policemen that if an officer asked him to make a statement, he had to give the statement, otherwise they would beat him again.

The police witnesses who were called by the prosecution to rebut the defence story, denied assaulting the accused. One witness, Inspector Samad bin Rasmani however, admitted that the police had every opportunity to beat the accused. Another witness Detective Constable Hussin bin Awang also admitted that there was opportunity to beat the accused.

The accused's story that he was beaten during interrogations cannot be rejected just because the police witnesses denied beating him and just because the accused could not identify those who assaulted him. The accused was subject to vigorous cross-examination by the learned Deputy Public Prosecutor and his story remained unshaken. The evidence of the accused that he was assaulted is consistent with the evidence of a witness called by the prosecution, namely, PW11, Sumari bin Saribu. PW11 told the Court that after he was arrested, he was beaten by the police. He also said that the police threatened to distribute his children in different police stations. He said he was asked to admit that the ganja belonged to him. He did not admit and the police started to assault him. PW11 further stated in his evidence:

> The police said if I wanted to live he could show me a way that I should press Kamde and to say that the things belonged to Kamde. He said if I did not press Kamde ... and then he punched me twice and pulled my nipple. The police said I had seven children, Police said he would distribute 7 children to each police station to be investigated further. I was punched when I refused to cooperate. My hands were handcuffed at the back when the police punched me ... At that time I did press Kamde. I pressed Kamde because he asked me to do so. I have no ill feeling against Kamde. At that time I was too scared if he asked me to eat shit I would do so ... I was punched twice before I pressed Kamde ... I was scared the police would punch me harder. I signed my name after I was punched ... I was arrested on 24 September at 10 a.m. I was punched on different days. About 2 days after I was arrested, I signed. I was arrested morning. Next evening I was punched and then subsequent evening I signed. I signed my name about 3 p.m. ...

The learned Deputy informed the Court that she wanted to impeach the credit of PW11, but subsequently she decided not to do so.

So, it is the prosecution case that PW11 was beaten until he agreed to make a statement. PW11 was called by the defence to testify in the trial within a trial and he repeated the same story as he said earlier.

In my opinion, there is a strong probability that the accused was assaulted on 11 and 12 January 1982, after which, he agreed to make a statement. By 13 January, the police were ready to record his statement. According to Inspector Kamaruddin, on 13 January 1982 at 3 p.m. he already asked Inspector Chan to record a cautioned statement from the accused.

Having considered all the evidence in the trial within a trial, I have no hesitation in coming to the conclusion that the accused was put under tremendous physical and mental pressure in order to compel him to make the statements.

For the reasons I have just stated, I ruled that the two cautioned statements purported to be made by the accused were inadmissible because I was fully satisfied that the statements were not made voluntarily. I was also satisfied that the statements were not made without coercion or threat.

When the prosecution closed their case, I find no evidence at all to link the accused with the cultivation of the ganja plants or with the exhibits. The only evidence is the evidence of PW11. In his evidence, PW11 said, "at that time I did press Kamde, I pressed Kamde because he, (meaning the police) asked me to do so. At that time I was too scared. If he asked me to eat shit, I would do so". That is the only evidence. Assuming that PW11 was not under pressure to give the evidence, the Court has to bear in mind that PW11 was found and arrested at the scene, and he is, therefore, an accomplice. His evidence is not corroborated by anyone in the sense that the plants belonged to the accused or the plants were cultivated by the accused.

The learned Deputy, in her submission, said that the prosecution was relying on circumstantial evidence in the present case. She said that after Sumari was arrested, he pointed at the accused's house, and there was also the close proximity between the accused's "kebun" and the place where the ganja was planted. But in law, in order for the prosecution to succeed their case on the basis of circumstantial evidence, the prosecution must adduce circumstantial evidence which point to the guilt of the accused. In this case, there is no such evidence.

The learned Deputy relying on the case of *Haw Tua Tau*, rightly pointed out to the Court that the prosecution, at the close of their case, need not prove the case beyond reasonable doubt. All they need to show, is that there are some credible evidence to link the accused, with the offence he is charged with. She has stated the law correctly. According to Haw Tua Tau, there must be some evidence which is not inherently incredible. The important word is "some evidence". In this case there is no evidence at all to link the accused with the cultivation of ganja or with the exhibits. I, therefore find no *prima facie* case against the accused. He is acquitted and discharged.

Also found at [1988] 2 CLJ 644